

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE,

Defendant.

CASE NO. C07-1979RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on cross-motions for summary judgment (Dkt. ## 24, 28). For the reasons explained below, the court GRANTS IN PART Plaintiffs' motion (Dkt. # 28) to the extent it requests *in camera* review, GRANTS IN PART Defendant's motion (Dkt. # 24) regarding the draft press materials and the "luminaries" documents, and reserves ruling on all other issues presented in the cross-motions pending *in camera* review.

II. BACKGROUND

In September 2006, the United States, acting through the Defendant Office of United States Trade Representative ("OUSTR"), entered into a Softwood Lumber

1 Agreement (“SLA”) with Canada. The SLA provides for the disbursement of \$450
2 million to “meritorious initiatives” related to certain causes. *See* Complaint (Dkt. # 1) ¶
3 11. OUSTR identified three meritorious initiatives to receive funding, and Plaintiffs
4 Center for Biological Diversity and Conservation Northwest are among a number of
5 organizations that expressed an interest in the program but were not selected for funding.
6 Malkin Decl. (Dkt. # 16) ¶ 2.

7 On March 2, 2007, Plaintiffs submitted a request to OUSTR under the Freedom of
8 Information Act (“FOIA”), seeking eight categories of documents including but not
9 limited to, all documents related to OUSTR’s selection of the three organizations selected
10 to receive meritorious initiatives funding. Complaint ¶ 12. In a March 6, 2007 letter,
11 OUSTR acknowledged receipt of Plaintiffs’ FOIA request and indicated that a search for
12 responsive records had begun. *Id.* ¶ 13. OUSTR provided twelve responsive documents
13 to Plaintiffs on November 15, 2007, and eight additional documents on December 10,
14 2007. Plaintiffs filed this lawsuit on December 10, 2007.

15 Since the commencement of the lawsuit, OUSTR has released additional
16 responsive documents. At this point in the proceeding, the OUSTR’s revised *Vaughn*
17 index lists approximately 194 documents. Plaintiffs challenge most of the documents
18 listed on the revised *Vaughn* index and request *in camera* review of those documents, as
19 well as seek additional discovery regarding the adequacy of OUSTR’s search for
20 documents and the applicability of exemptions to the documents withheld.

21 **III. ANALYSIS**

22 An agency must disclose documents requested under FOIA unless a statutory
23 exemption applies. 5 U.S.C. § 552(b). FOIA exemptions are narrowly construed. *See*
24 *Assembly of State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).
25 The agency bears the burden of showing that a withheld document is exempt from
26 disclosure. 5 U.S.C. § 552(a)(4)(B). The agency must explain with specificity why each
document or portion of a document is exempt. *Vaughn v. Rosen*, 484 F.2d 820, 825-26
(D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). An agency’s “*Vaughn* index” may

1 not rely upon “conclusory and generalized allegations of exemptions.” *Id.* at 826. The
2 agency “may rely upon detailed affidavits or oral testimony so long as the evidence
3 offered enables the court to make an independent assessment of the government’s claim
4 of exemption.” *Church of Scientology v. U.S. Dep’t of Army*, 611 F.2d 738, 742 (9th Cir.
5 1979). If the evidence submitted by the agency is not specific enough for the court
6 determine whether a FOIA exemption applies, the court has discretion to examine the
7 disputed documents *in camera*. *See id.* at 742-43.

8 OUSTER contends that all of the documents listed on the *Vaughn* index are exempt
9 from disclosure under FOIA’s fifth exemption. This exemption applies to “inter-agency
10 or intra-agency memorandums or letters which would not be available to a party other
11 than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). FOIA Exemption
12 Five also “incorporates the attorney-client privilege, the attorney-work product privilege,
13 and the executive ‘deliberative process’ privilege that protects candid internal discussion
14 of legal or policy matters.” *Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d
15 1082, 1083 n. 1 (9th Cir. 1997).

16 The question of whether the “deliberative process” privilege applies “turns on
17 whether disclosure of the requested information would reveal anything about the
18 agency’s decisional process.” *Carter v. United States DOC*, 307 F.3d 1084, 1088 (9th
19 Cir. 2002). Only opinions or recommendations, not purely factual material, are protected
20 under this privilege. *See In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 577, 581
21 (E.D.N.Y. 1979). More specifically, a document withheld under the “deliberative
22 process” privilege must be both pre-decisional (“prepared in order to assist an agency
23 decisionmaker in arriving at his decision”) and deliberative, in the sense that “the
24 disclosure of the materials would expose an agency’s decisionmaking process in such as
25 way as to discourage candid discussion within the agency and thereby undermine the
26 agency’s ability to perform its functions.” *Assembly*, 968 F.2d at 920 (internal citations
and quotation marks omitted).

1 OUSTR asserts that the documents listed on its *Vaughn* index are protected by
2 Exemption Five's deliberative process privilege, the attorney work-product privilege,
3 and/or the attorney-client privilege.¹ A few categories of documents on the *Vaughn*
4 index are sufficiently described to allow the court to conclude that they have been
5 properly withheld, but the court reserves ruling on other categories of documents pending
6 *in camera* review.

7 **A. The Draft Press Materials are Exempt From Disclosure.²**

8 Plaintiffs challenge the withholding of documents that they characterize as draft
9 press materials. They contend that drafts of press materials are not exempt under the
10 deliberate process privilege because they do not pertain to the SLA's policy formation,
11 but only to communications about the policy. *See Mayer, Brown, Rowe & Maw LLP v.*
12 *I.R.S.*, 537 F. Supp. 2d 128 (D.D.C. 2008) (ordering the disclosure of draft press releases
13 "because they did not 'bear on the policy formation' involved") (quoting *Wilderness*
14 *Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1 (D.D.C. 2004)); *Fisherman's Finest, Inc. v.*
15 *Gutierrez*, 2008 WL 2782909 at *4 (W.D. Wash. July 15, 2008).

16 In this case, OUSTR seeks to protect draft press releases and question-and-answer
17 ("Q&A") documents that were drafted before the final form of the SLA had been
18 adopted. Most of these draft press documents, unlike those in cases cited by Plaintiffs, do
19 bear on the policy formation at issue because they were written before the final policy
20 was formed. *See* Apol Decl. (Dkt. # 33) ¶ 21. Two of the Q&A documents (P204 and
21 P206) were written after the SLA was implemented, but they reference draft versions of
22 OUSTR's communications policy regarding the SLA. *See id.* ¶ 20. Just as Exemption

23 ¹ OUSTR also relies upon FOIA Exemption Six for three documents listed on the revised
24 *Vaughn* index (P78, P178, P194), but the withholding or redacting of that personal contact
25 information is not challenged by Plaintiffs. This information was properly redacted or
26 withheld.

27 ² The documents included in this analysis are those listed as press/Q&A documents on the
28 revised *Vaughn* index: P26, P27, P82-85, P90-91, P97, P99-100, P102-04, P113-14, P155,
29 P187, P193, P197-98, P200-201A, P204, P206.

1 Five applies to documents revealing the deliberative process that culminated in the SLA
2 itself, it also applies to protect documents revealing the deliberative process that
3 culminated in the final SLA communications policy. Final versions of the press releases
4 and Q&A documents have been released to Plaintiffs, but earlier drafts reflecting pre-
5 decisional deliberations were properly withheld or redacted under the deliberative process
6 privilege. The court is satisfied, based on OUSTR's revised *Vaughn* index and the David
7 Apol Declarations, that these documents are protected by Exemption Five.

8 **B. The “Luminaries” Documents are Exempt From Disclosure.³**

9 Plaintiffs challenge the OUSTR's withholding of documents related to the
10 “luminaries” option, contending that there is some evidence that the “luminaries” played
11 a decisionmaking role regarding meritorious initiatives and that they are entitled to at
12 least know their identities.

13 According to OUSTR, the “luminaries” option refers to “a structure for
14 implementation of the meritorious initiatives portion of the SLA that was considered and,
15 ultimately, not pursued.” Apol Decl. (Dkt. # 33) ¶ 17. This evidence is sufficient to
16 allow the court to conclude that documents related to the “luminaries” option are both
17 pre-decisional and deliberative, because they discuss an option that was considered but
18 rejected before the SLA was finalized. The court is satisfied, based on OUSTR's revised
19 *Vaughn* index and the David Apol Declarations, that these documents are protected by
20 Exemption Five.

21 **C. The Court Will Review *In Camera* All Other Documents Not Expressly
22 Exempted From Disclosure in This Order.**

23 OUSTR's evidence related to the all other documents listed on the revised *Vaughn*
24 index is insufficiently specific to allow the court to determine whether the withholding or
25 redacting was appropriate, and the court will exercise its discretion to conduct an *in*

26 ³ The documents included in this analysis are those listed in the revised *Vaughn* index as
related to the “Luminaries” option: P153, P155, P159-163, P164A-177.

1 camera review of the remaining disputed documents. Though the Plaintiffs request
2 additional discovery under Fed. R. Civ. P. 56(f) before the court conducts *in camera*
3 review, Plaintiffs have not shown that proposed discovery is necessary or would provide
4 new information helpful to the court at this stage. After the conducting the *in camera*
5 review, the court will consider whether any of the additional discovery proposed by
6 Plaintiffs will produce information relevant to the court's ultimate resolution of the cross-
7 motions.

8 Therefore, OUSTER is directed to submit the following documents to the court no
9 later than April 3, 2009: P1-24, P29-74, P87, P93-95, P98, P101, P105-P112, P115-152,
10 P154, P156-P158, P164, P179-186, P189-P192, P195-96, P199, P202-03, P215-99.

11 Where these documents have been provided to Plaintiffs in redacted form, the court
12 requests a copy of both the unredacted document and a copy with the redactions
13 highlighted. Along with the submission of these documents, the court requests that
14 OUSTER supplement its revised *Vaughn* index with the following information for each
15 document:

- 16 (1) The author of the document (and if this person is an attorney, indicate
17 whether the person was communicating as an attorney or in some other
18 capacity);
- 19 (2) If the deliberative process privilege is claimed, identify the role the
20 document played in the deliberative process; and
- 21 (3) A chart or some other summary of the authors and recipients of these
22 documents, and their positions in the decisionmaking hierarchy and/or
23 OUSTER's chain of command.
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2 **IV. CONCLUSION**

3 For these reasons, the court GRANTS IN PART both motions (Dkt. ## 24, 28),
4 reserves ruling on the remaining issues, and orders that OUSTR submit the documents as
5 described in the previous section no later than April 3, 2009. The trial date and all related
6 pretrial dates (Dkt. # 23) are VACATED.

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8 DATED this 13th day of March, 2009.

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12 The Honorable Richard A. Jones
13 United States District Judge
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